

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

AGORA CYBER CHARTER SCHOOL

Employer

and

Case 04-RC-170767

AGORA CYBER EDUCATION
ASSOCIATION, PSEA

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

This case presents the question of whether a petitioned-for unit of three teacher classifications is appropriate or whether certain other employees who work with the school's students must be included in that unit. Because teachers have a distinctive skill set and qualifications, I find, as discussed below, that they constitute an appropriate unit. While the petitioned-for classifications teach their students online in a cyber school, the considerations informing my decision are no different than they would be in a school in which the teachers and students are in the same physical structure.

Petitioner Agora Cyber Education Association, PSEA, seeks to represent a unit of general academic teachers, special education teachers, special education instructional support employees, and specialists who teach online classes for the Agora Cyber Charter School (the Employer). The Employer contends that its family coaches, strong start coaches, and the advanced learners coach should be included in the unit. As a threshold matter, the Employer contends that it is exempt from the Board's jurisdiction as a political subdivision pursuant to the Supreme Court's decision in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

A Hearing Officer of the Board held a hearing, and the parties presented oral argument on the unit issue and submitted briefs on the jurisdictional issue. I have considered the evidence and the arguments presented by the parties, and as discussed below, I conclude, in agreement with Petitioner, that the Employer is not exempt from the Board's jurisdiction pursuant to the *Hawkins County* test. I further find that the petitioned-for unit is appropriate.

I. OVERVIEW OF OPERATIONS

The Employer's Organizational Structure

The Employer operates a public cyber charter school that provides kindergarten through 12th grade educational services to Pennsylvania students in virtual classrooms. There are approximately 8,400 students enrolled in the cyber school. 19.3 percent of the students are special education students.

Students may choose to enroll in a cyber charter school instead of a traditional “brick and mortar” school for a variety of educational and social reasons. Students do not pay tuition, and the Employer cannot refuse to enroll them if they reside in Pennsylvania. Funding for the Employer’s operations is statutorily mandated by the Pennsylvania legislature, and the funds are provided by the school district where the student resides and will be supplemented by state contributions if the student’s school district does not have sufficient funds.¹

The overall day-to-day operations of the Employer are the responsibility of its Chief Executive Officer (CEO), Dr. Chad Antonio. Dr. Antonio oversees a management team of administrators and supervisors who handle technological and financial matters. These individuals also develop and maintain the curriculum and supervise and evaluate the employees.

Paul W. DeAngelo, Chief Financial Officer (CFO), in coordination with the treasurer of the Employer’s Board of Trustees (BOT), prepares the budget and all required financial reports. He also oversees an annual independent audit that is required by the state. Both Antonio and DeAngelo report to the BOT.

There are approximately 398 employees in the petitioned-for voting unit. An additional 83 employees serve in the disputed classifications of family coaches, strong start coaches, and advanced learners coach.²

The Employer reorganized its operations after it ended its relationship with a management company in 2015 and became self-managed. The Employer does not currently have an organizational chart, but placed a chart into evidence that it may use at an undetermined time in the future. Human Resources Coordinator Indra Morales testified that, “This is an organizational chart that was created as part of a recent restructuring that we’re doing. This is the way the organization is going to look. It’s a future plan. Some of this is accurate. Some of these positions have not been filled yet.”

According to this prospective organizational chart, the Employer has three major departments. One department is headed by the Director of Human Resources and consists of all

¹ The Employer admits that it otherwise meets the Board’s applicable commerce standard for educational institutions.

² The Employer initially sought to include academic coaches. That position no longer exists, however, and the employees from that erstwhile classification are now working as teachers and are included in the unit.

the Human Resources staff. Another department, headed by the CFO, consists of operations, finance, technology, child accounting, and federal program staff.

The third and largest department is headed by the Director of Academics and Achievement, a position that is currently vacant. This department has five subdivisions and includes all of the positions relating to student education. The first subdivision is headed by the Director of Pupil Services, another currently vacant position, and contains the classifications of school nurses, social workers, truancy prevention coordinator, and guidance counselors, as well as the family coaches sought by the Employer. The next subdivision is led by the principals of the elementary, middle school, and high schools and contains the petitioned-for general education teachers, as well as the advanced learners coach, the student transition coach, and the curriculum coordinator. The third division is headed by the Director of Special Education and consists of the special education staff, including petitioned-for special education teachers, an administrative assistant, related services assistant, medical access specialist, medical access billing employees, a psychologist, the psychologist services coordinator, the evaluation assistant, and a special education enrollment specialist. The fourth division is headed by the Focus Intervention Coordinator and includes the intervention specialist and the petitioned-for specialists. The final subdivision is headed by the Supervisor of Enrollment and Engagement and contains staff relating to enrollment and engagement, including the strong start coaches, the enrollment administrator, the orientation coordinator, and the parent engagement coordinator. The record does not indicate which positions in this department are supervisory, managerial, or confidential, but the titles of some of these classifications suggest supervisory status.

The petitioned-for classifications

The approximately 275 general education teachers provide online instruction to students. They are required to have a Bachelor's degree and a teacher's certification. Depending on their specific certification, teachers may be limited to teaching only certain grades or subjects. Elementary and middle school teachers are less likely to teach specific subjects than high school teachers. Teachers report to the principal or assistant principal for their level or grade. Since they teach online, teachers can essentially live anywhere, but the Employer requires them to live in or near Pennsylvania.

The 112 special education teachers teach students with learning disabilities, each of whom have an Individualized Education Plan (IEP). These teachers have a specific caseload of students. The five or six instructional support employees, who the parties agree should be part of the unit, provide support for the special education teachers but do not carry their own student caseloads. Like the general education teachers, the special education teachers and instructional support teachers are required to have a Bachelor's degree and teacher certification. They report to the Assistant Director of Special Education.

The 21 specialists teach students who are performing below grade level in specific subjects. Currently, they teach math, reading, and biology. They supplement the students' classroom learning as needed to help improve their performance. Like the other teachers, they are required to have a Bachelor's degree and teacher's certification.

The classifications the Employer seeks to add

The 78 family coaches report to the family coach coordinator, who will report to the Director of Pupil Services when that position is filled. Family coaches each have a roster of students for whom they are responsible. Family coaches, unlike teachers, are assigned to work in geographic regions near their homes so they can meet with the students and families they serve face-to-face as well as virtually. After a student and the student's family have completed the orientation process, family coaches meet with them and create an Individual Learning Plan (ILP), which sets annual goals for the student. The goals may be personal as well as academic, such as to improve test-taking abilities or study skills. In addition to formulating the ILPs, family coaches work with the students and their families to resolve issues that may hinder their achievement, such as attendance or computer technology issues. For example, if a student is having an attendance problem, the family coach might work with the family to ensure that the student attends class or that the student's attendance is properly recorded in the system. Family coaches have face-to-face meetings scheduled with students each week; they meet most often with students who are having difficulties. The family coach coordinator testified that when she was a family coach, she conducted some group tutoring sessions for her students, and family coaches also do this now. The family coach job description indicates that a Bachelor's degree is not required, although it is preferred. Sandy Emerich, Director of Human Resources, testified that, notwithstanding the job description, the Employer currently requires all family coaches it hires to have a Bachelor's degree; some of the holdovers in this position do not have a Bachelor's degree, however. Many, but not all of the family coaches are also certified as teachers.

The four strong start coaches play an important role in the student orientation process. They interact with students and their families for a short period of time soon after they enroll to help them acclimate to cyber learning. In addition to ensuring that the orientation process goes smoothly, they identify students who might need extra academic attention. Strong start coaches are required to have a Bachelor's degree but not a teacher certification. They report to the Director of Academics and Achievement.

The advanced learners coach is responsible only for gifted students. It is not clear whether this employee works directly with students, teachers, or others. The organizational chart shows that the advanced learners coach reports to a principal, but Human Resources Coordinator Indra Morales testified that in the future, the advanced learners coach is likely to report to the Director of Pupil Services.

II. JURISDICTION

A. Relevant Legal Decisions

Section 2(2) of the Act explicitly excludes "any State or political subdivision thereof" from the definition of "employer." The term "political subdivision" is not defined in the Act. In

NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971), the Supreme Court adopted the Board’s test for whether an entity is an exempt political subdivision of a state. Pursuant to this test, an entity is exempt only if it is either: (i) created by a state, so as to constitute a department or administrative arm of the government; or (ii) administered by individuals who are responsible to public officials or to the general electorate. *Id.* at 605.

In *Hawkins*, the Supreme Court found that federal law under the National Labor Relations Act, not state law, is controlling in determining whether an entity is a political subdivision and thus not an "employer" subject to the Act. The Court stressed that the Board should examine the entity's actual operations and characteristics when assessing its Section 2(2) status. *Id.* at 603-604, adopting the holding of *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965).

Applying the principles of *Hawkins*, the Board exercised jurisdiction over a charter school created under Illinois state law in *Chicago Mathematics & Science Academy Charter School*, 359 NLRB No. 41 (2012). The Board held that the legislature’s characterization of the charter schools as “public schools” was not controlling and that, “where the appointment and removal of a majority of an entity’s governing board members is controlled by private individuals – as opposed to public officials - the entity will be subject to the [NLRB’s] jurisdiction.” See *Chicago Mathematics*, slip op. at 8. This is consistent with prior Board cases finding that the question of whether an entity is “administered by” individuals responsible to public officials or to the general electorate is assessed by determining whether those individuals are appointed by and subject to removal by public officials. *Research Foundation of City University of NY*, 337 NLRB 965, 969 (2002); *Oklahoma Zoological Trust*, 325 NLRB 171, 172 (1997).

B. FACTS

1. Applicable Pennsylvania Statutes

In 1997, the Pennsylvania legislature amended the Public School Code (PSC)³ to include a provision for the establishment of charter schools. Article XVII, known as the Charter School Law (CSL),⁴ sets forth the process by which a charter school can be established or an existing school can be converted into a charter school. Schools that operate under a charter in Pennsylvania are divided into three general types: charter schools, regional charter schools, and cyber charter schools. As defined by the CSL, a cyber charter school is "an independent public school established and operated under a charter from the Department of Education and in which the school uses technology in order to provide a significant portion of its curriculum and to deliver a significant portion of instruction to its students through the Internet or other electronic means." A cyber charter school must be organized as a public, nonprofit corporation, as a charter may not be granted to a for-profit entity.⁵

³ P.L. 30, No. 14 (1949).

⁴ 24 P.S. Sections 17-1700, *et seq.*

⁵ 24 P.S. Section 17-1703-A.

In contrast to traditional charter schools which are created by their local school districts, charters to operate cyber charter schools are issued by the Pennsylvania Department of Education (PDE), which is a Commonwealth agency as defined in the Administrative Agency Law.⁶ The PDE renews and revokes cyber charter schools' charters as necessary. The PDE is also charged with assessing and evaluating cyber charter schools to ensure compliance with their own charters and applicable statutes and regulations.⁷ When a cyber school's charter is revoked, or if its application is denied, it can appeal to Commonwealth's Charter School Appeal Board.

Under the CSL, the board of trustees of a charter school has the authority to decide matters related to the operation of the school, including, but not limited to, the budgeting, curriculum and operating procedures, subject to that school's charter. It has the authority to employ, discharge, and contract with necessary professional and nonprofessional employees, subject to the school's charter and applicable law.⁸ The CSL provides that trustees of a charter school shall be deemed "public officials" and that an administrator or CEO shall be deemed a "public official" for the purposes of ethics standards and financial disclosure under prevailing Pennsylvania law.⁹ For purposes of tort liability, employees of a charter school are also considered "public employees" and the board of trustees is considered a "public employer."¹⁰

A charter school may be established by: an individual; one or more teachers who will teach at the proposed school; parents or guardians of students who will attend the charter school; any nonsectarian college, university or museum located in the Commonwealth; or any nonsectarian corporation, not-for-profit corporation, association, partnership, or other entity.¹¹ Section 17-1745-A of the CSL provides specific details regarding the procedure for the establishment of a cyber charter school and provides that a cyber charter school may be established by application to the PDE by any individual or interested group and will be nonsectarian.

With respect to staffing, the CSL states that the board of trustees shall determine the level of compensation and all terms and conditions of employment of the staff. It further provides that employees of a charter school may organize under the Pennsylvania Public Employee Relations Act.¹² According to the CSL, collective-bargaining units at a charter school shall be separate from any collective-bargaining unit of the school district in which the charter school is located and shall be separate from any other collective-bargaining unit.¹³

As to employee benefits, the CSL provides that all employees of a charter school shall be enrolled in the Public School Employees' Retirement System (PSERS) unless, at the time of the application for the charter school, the sponsoring district or the board of trustees of the charter school has a retirement program which covers the employees. The Commonwealth makes

⁶ 24 P.S. Section 17-1741-A(a).

⁷ 24 P.S. Sections 17-1741-A through 17-1751-A.

⁸ 24 P.S. Section 17-1716-A(a).

⁹ 24 P.S. Sections 17-1715-A(11) and (12).

¹⁰ 24 P.S. Section 17-1727-A.

¹¹ 24 P.S. Section 17-1717-A(a).

¹² 24 P.S. Section 17-1724-A(a)

¹³ 24 P.S. Section 17-1724-A(a).

contributions on behalf of charter school employees and the charter school makes payments to Social Security for the employees.¹⁴ The PDE also publishes “Basic Education Circulars” (BECs) which summarize responsibilities under various Pennsylvania codes and statutes.

Section 17-1749-A of the CSL sets forth the requirements and regulations with which cyber charter schools must be in compliance, including provisions for health, safety, attendance, and academic standards. Cyber charter schools must file an annual report and an annual budget with the Commonwealth and these are subject to audit. Finally, Section 17-1743-A of the CSL lists specific requirements and prohibitions for cyber charter schools regarding their communications with school districts, parents, and students. If a charter school fails to abide by its duties and responsibilities, its charter can be revoked and its assets retracted by the Commonwealth for distribution for other educational purposes.

2. The Employer’s Operations

i. The Employer’s Charter

The Employer was founded in Pennsylvania in 2004 as a public cyber charter school by Dr. Dorothy Brown, a private individual. As described in its Bylaws, its mission is to “provide an innovative, intense academic preparation that inspires and educates students to achieve the highest levels of academic knowledge and skills and develop proficiency in the design and use of new computer technologies and scientific research.” It is a public non-profit corporation. The Employer first applied for a charter on October 1, 2004, and its charter was initially approved by the PDE on June 29, 2005 for a five-year period. The charter provides the parameters, boundaries, accountability requirements, and responsibilities under which the Employer currently operates.

In 2009, the PDE instituted revocation procedures for the Employer’s charter because of alleged financial irregularities, and the Employer responded by filing lawsuits against the PDE in Pennsylvania and federal courts. The parties eventually reached a settlement agreement, as discussed below.

The Employer’s charter was renewed by the PDE in 2010. In 2014, the Employer again applied to renew its charter, but approval has not yet been granted. Until that renewal is approved, the Employer continues to operate under its 2010 charter.

Recently, the Employer has been experiencing operational and financial difficulties. As a consequence, the PDE gave the Employer a “corrective action” and requested information concerning, inter alia, the Employer’s finances, curriculum, staff, technology, and systems. The Employer is in the process of responding to this request.

ii. The Employer’s Board of Trustees

Under the Employer’s Bylaws, which were last amended on March 3, 2016, the BOT is comprised of not more than seven members. There are currently five members. The Trustees

¹⁴ 24 P.S. Section 17-1724-A(c).

are elected by the BOT itself, for terms of three years. Trustees are neither employed nor paid by the Employer. The BOT sets wages for the Employer's staff, is ultimately responsible for the hiring, firing, and discipline of its employees, and establishes all policies and procedures related to employment.

The CSL does not give the PDE nor the students' school districts, which provide funding to the Employer, any authority to select, appoint, or remove Trustees or to hire, fire, or discipline the Employer's employees. Although Mary Steffey, a member of the BOT since 2009 and its current President, testified that the PDE was intimately involved in the selection or "vetting" of the 2009 BOT, she could not give any details concerning how or under what authority the PDE acted in this process.

The 2009 settlement agreement provides some clarity. Pursuant to this agreement, the BOT agreed to resign following the appointment of a replacement BOT that was acceptable to the PDE. In return, the PDE agreed to stop procedures to revoke the Employer's charter, and the school agreed to the dismissal of its lawsuits against the PDE. Steffey further testified that she believed the PDE was involved in the removal of Dr. Brown, the Employer's founder and BOT President. However, this removal occurred before Steffey joined the BOT, and she was unable to provide any details as to how the removal occurred. The record suggests that the removal was part of the settlement agreement.

The BOT determines the Employer's curriculum, which cannot be changed without the BOT's approval, but must be in compliance with the Commonwealth's established standards. It also approves and ratifies all contracts over \$5,000, authorizes all expenditures, and adopts the Employer's annual budget, which is prepared by the CFO in consultation with the BOT's treasurer and Finance Committee. Notably, this authority comes from the CSL, which states:

The board of trustees of a charter school shall have the authority to decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum and operating procedures, subject to the school's charter. The board shall have the authority to employ, discharge, and contract with necessary professional and nonprofessional employees, subject to the school's charter and provisions of this article.¹⁵

Like traditional school boards, the Employer's BOT is subject to the Pennsylvania Sunshine Act, and its Trustees must take all official action at public meetings. It provides notice of meetings, and meeting agendas are posted on the Employer's public website. The Trustees are also subject to Pennsylvania's Public Official and Employee Ethics Act, and the Employer must provide documents upon request pursuant to the Right to Know Act. In addition to the requirement of an annual audit by a certified public accounting firm, the Employer is subject to audit by the Pennsylvania Auditor General. Like public school board members, the Trustees, CEO, and other officials of the Employer must file annual financial disclosure statements and state ethics forms governing public officials.

¹⁵ 24 P.S. Section 17-1716-A(a).

Trustees are elected by other BOT members to three-year terms of office, and are not subject to any term limits. In contrast, under the PSC, a public school board must be composed of nine members and all members must be elected by the voters in the school district for terms of four years. A public school board member may be appointed by other board members if vacancies occur between elections, but the appointed member must stand for election at the next election opportunity. In addition, such matters as the manner of voting, the constitution of a quorum, and the time, duration, and regularity of meetings are within the discretion of the Employer's BOT but are mandated by the PSC for traditional school boards.

Parents may file complaints with the PDE, though in its September 1, 2006 BEC, the PDE stated that it would either refer such complaints to an existing complaint procedure if one existed or forward it to the school for a response. The only record evidence of complaints concerned those by parents against Dr. Brown in 2009. As discussed above, the PDE subsequently instituted revocation proceedings which resulted in a settlement agreement and Dr. Brown's eventual departure from the BOT.

iii. The Employer's Employees

The record reveals some similarities but also several key differences in the terms and conditions of employment for teachers in Pennsylvania public schools and those in charter schools, including cyber charter schools. For example, all teachers in Pennsylvania public schools are required to have a "teaching certificate" in their area of expertise, which is issued by the PDE. In contrast, under the CSL, only 75 percent of a charter school's teachers are required to hold a teaching certificate from the PDE, although all of the Employer's teachers are certified by the PDE.

Additionally, cyber charter schools are not required to abide by all provisions of the PSC unless the CSL has specifically so stated.¹⁶ Certain provisions of the PSC applicable to traditional public schools, which relate to personnel policies and involve due process concerns and procedures for furloughing employees, are not binding upon the Employer and other charter schools. For example, public schools are required to seek PDE approval before laying off employees, whereas the Employer, when it laid off 136 employees recently, only secured the approval of its BOT. Similarly, under the PSC, employees of public school districts may only be terminated for the reasons set forth in the statute, must be given notice and hearing rights, and their terminations must be upheld by a two-thirds majority vote of their respective school boards. There appear to be no such requirements in the CSL, and the Employer in fact has approved terminations based on a simple majority vote by the BOT. Similarly, sections of the PSC pertaining to teacher ratings and evaluations do not apply to the Employer.

The Pennsylvania Educator Discipline Act polices all of the Commonwealth's certified teachers, including those employed at charter schools, and the PDE may revoke certificates if necessary for proscribed conduct. However, this law also applies to private and parochial schools, and to teachers who hold certificates but are not engaged in teaching or in education. PSC and CSL allow public school employees to leave their positions in order to work for charter schools and then return to those public positions without losing tenure. All of the Employer's

¹⁶ 24 P.S. Section 17-1732(A), 1715(A).

employees who work more than 500 hours in a school year, including the administrators, CEO, and CFO, participate in the PSERS retirement system, which is mandated by 24 P.S. Section 17-1724-A(c). The Employer's full-time employees are eligible to receive health and dental insurance, and the CSL requires that the Employer's employees be provided with health care benefits comparable to what they would receive if they were employed by the PDE.

iv. The Employer's Funding and Budget

Almost all of the Employer's operating budget comes from its students' school districts. Funding will be added by the Commonwealth of Pennsylvania if the school district does not have sufficient funds. Each student's home school district submits a percentage of its annual per-pupil cost directly to the Employer. The remainder of the Employer's funding comes from federal monies, which pass through the Commonwealth, pursuant to the No Child Left Behind Act and the Individuals with Disabilities Education Act.

According to the PSC, public schools in Pennsylvania are funded by a combination of local property taxes and educational funding from the Commonwealth. The school boards of the local school districts have been given the authority by the legislature to levy taxes and they can set their own millage rates up to the maximum permitted by Pennsylvania law. In contrast, the Employer's BOT cannot levy or raise taxes and has no authority to fund its own operations. There is also no requirement in the PSC or the CSL that the funding received by the Employer or any other charter school be disbursed in any specific manner, although, as mentioned above, all expenditures are subject to audit. Further, there is no requirement that the Employer's budget be submitted to any government entity for approval, although it is submitted to the PDE, after it is approved by the Board. The Employer is required to submit annual financial reports to the PDE.

C. ANALYSIS

The Employer argues that it is exempt from the Board's jurisdiction under both prongs of the *Hawkins* test. First, the Employer asserts that it was created directly by the Commonwealth of Pennsylvania, and is therefore a political subdivision, because its charter was created by the PDE, a department of the Commonwealth. The Employer further argues that the second prong of *Hawkins* is satisfied because its administration is overseen by public officials, the Employer's BOT. In this regard, the Employer relies on the plain language of 24 P.S. 17-1715-A(11), which states that "Trustees of a charter school shall be public officials." The Employer also argues that PDE oversight of its operations and its various reporting requirements, which are mandated by Pennsylvania, establish that it is responsible to and controlled by public officials so as to be deemed a political subdivision of government. For the reasons that follow, I find that the grant of a charter by the PDE is insufficient to render the Employer a creation of the Commonwealth, and that the Employer's Trustees are not public officials within the meaning of *Hawkins*. Rather, like the employer in *Chicago Mathematics*, the Employer was created by a private individual, and its Trustees are not appointed by or responsible to public officials.

1. The Employer Was Not Created by the Commonwealth and is Not an Administrative Arm of State Government

The key inquiry in determining whether an entity is a political subdivision under the first prong of the *Hawkins* test is whether the entity was created by the state, so as to create a state department or an arm of government. The Employer relies initially on the fact that the Employer's charter has been approved and renewed by the PDE in accordance with the CSL. The record is clear that an individual, Dr. Brown, originally applied for and was issued a charter by PDE to operate the Employer. Before applying for the initial charter, she filed for non-profit corporate status with the Pennsylvania Department of State. Thus, the granting of the charter by PDE did not create the Employer; rather, it was created by a private individual.

The Employer is not the first organization to make this argument. The question of whether charter schools in Pennsylvania come within the Board's jurisdiction has been litigated on three previous occasions. In *The Pennsylvania Cyber Charter School*, 06-RC-120811 (February 14, 2014), the Regional Director for Region Six rejected a claim that a charter school created under Pennsylvania law was a political subdivision and asserted jurisdiction. The Board denied review in an unpublished order. 2014 WL 1390806 (April 9, 2014). In *The Pennsylvania Virtual Charter School*, 04-RC-143831 (February 11, 2015),¹⁷ and *John B. Stetson Charter School*, 04-RC-151011 (May 14, 2015),¹⁸ Region Four Regional Director Dennis P. Walsh found that two different charter schools organized under Pennsylvania law were not exempt from the Board's jurisdiction. In all three of these cases, the employers argued that they had been "created" by the Commonwealth of Pennsylvania because the state had given them charters to operate schools. This argument was rejected in all of these cases. For essentially the same reasons articulated in these prior cases, I reject it again here. The Employer exists as a result of the Pennsylvania charter school statute, but this does not mean it was "created" by that law.

The Board has consistently held that entities created by private individuals as non-profit corporations are not exempt under the first prong of the *Hawkins* test. See *Chicago Mathematics*, slip op. at 6, and *Research Foundation of City University of NY*, supra, at 968. In this connection, I am not persuaded by the Employer's argument that the involvement of the PDE in approving the Employer's charter and its periodic renewal is determinative of the issue. The initiative to establish the Employer was undertaken by a private individual, and thus there was no enabling action by the Commonwealth. I am similarly not persuaded by the Employer's argument that the facts herein are distinguishable from *Chicago Mathematics* because in that case, cyber charter schools were chartered by local school districts. Again, the record is clear that it was the actions of private individuals that resulted in the establishment of the Employer, not any mandate, affirmative action, or direct intervention by any government entity. Cf. *University of Vermont*, 297 NLRB 291, 295 (1989) (finding the University of Vermont exempt under the first *Hawkins* prong where the University was created by a special act of the Vermont legislature). The Employer is a corporate entity which holds a charter to function as an independent public school, in a manner more akin to a subcontractor than a department of government.

¹⁷ That case is currently under review by the Board.

¹⁸ The employer's Request for Review in that case became moot after the petitioner withdrew the petition.

Further, in *Chicago Mathematics*, the Board expressly held that an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a governmental entity. *Chicago Mathematics*, slip op. at 6. There, even though the employer received about 80 percent of its funding from public schools, the public schools did not advise on how to allocate the Employer's budget. In this case, the Employer receives its entire budget from public funds, and similarly operates under a Charter School Agreement between it and the PDE. The financial support of state and local governments, however, is not dispositive of the jurisdictional question. *Connecticut State Conference Board*, 339 NLRB 760, 763 (2003); *FiveCAP, Inc.*, 331 NLRB 1165, 1168 (2000), enfd. 294 F. 3rd 768 (6th Cir. 2002).

Moreover, as the Board noted in *Pennsylvania Cyber* and the Regional Director found in *Pennsylvania Virtual* and *John B. Stetson*, the fact that Pennsylvania state statutes describe charter school trustees and administrators as "public officials," designate charter schools as "public employers" for purposes of assessing tort liability, and give charter school employees the right to organize under the Pennsylvania Public Employee Relations Act (PPERA) (24 P.S. Sections 17-1715-A(11) and (12), 17-1727-A and 17-1724-A(a)) is not determinative.

Accordingly, I find that the Employer does not meet the first prong of the *Hawkins* test to be deemed a political subdivision, as it was not created directly by a government entity, a legislative act, or a public official, but rather by a private individual.

2. The Employer is Not Administered by Individuals Who Are Responsible to Public Officials or to the General Electorate

For an entity to be exempt from the Act's coverage under the second prong of *Hawkins*, it must be administered by individuals who are responsible to public officials or to the general electorate. 402 U.S. at 605. The key inquiry is whether an entity is "administered by" individuals responsible to public officials or to the general electorate. Administrators are "responsible to public officials" if they are appointed by and subject to removal by public officials. *Research Foundation of City University of NY*, supra. The Board has consistently asserted jurisdiction in cases where public officials have no role in the selection and removal of an employer's officers or directors. See, e.g., *Research Foundation of City University of NY*, supra, at 969-970 (Board asserted jurisdiction where none of the employer's board members were appointed or subject to removal by public officials); *Cape Girardeau Care Center*, 278 NLRB 1018, 1019-1020 (1986) (Board asserted jurisdiction where the county's approval of the employer's board of directors was "purely ministerial" and the county had "no greater authority to remove one of the [e]mployer's board members than to remove a board member of any other nonprofit corporation"). Cf. *Regional Medical Center at Memphis*, 343 NLRB 346, 358-360 (2004) (no jurisdiction where employer was administered by publicly appointed and removable officials). The Board has held that whether an employer's governing board is subject solely to private appointment and removal is the critical and determinative factor in the second-prong analysis. *Chicago Mathematics*, supra, slip op. at 9-10.

As noted above, the Employer argues that its Trustees are public officials based on certain language found in the CSL to the effect that the administrators of a charter school are

public officials for purposes of compliance with state regulations concerning ethical standards and financial disclosures. The Board has held that “while such State law declarations and interpretations are given careful consideration ... they are not necessarily controlling.” *Natural Gas Utility Dist. of Hawkins County*, 167 NLRB 691 (1967), quoted in *Hawkins*, 402 U.S. at 602. See also *Chicago Mathematics*, slip op. at 7. The Supreme Court has also held that federal law, not state law, governs the determination under Section 2(2) of the Act as to whether an entity created under state law is a “political subdivision” and not an employer subject to the jurisdiction of the Board. *Id.* at 603. Moreover, while I recognize that Pennsylvania Labor Relations Board (PLRB) decisions are not controlling, I take administrative notice of *Agora Cyber Charter School*, 45 PPER 6 (2013), in which the PLRB, which has jurisdiction over Pennsylvania public employers, declined to assert jurisdiction over the Employer, finding that the BOT members were not public officials, citing *Chicago Mathematics*.¹⁹

In *Pennsylvania Cyber*, *Pennsylvania Virtual*, and *John B. Stetson*, all of which involved the same Pennsylvania laws and guidelines and had similar facts, the employers were all determined to be subject to the Board’s jurisdiction. In those three cases, it was found that no state or local officials were involved in the selection or removal of any members of the employers’ governing board of trustees or in the hiring of their staff, including their CEOs, and that neither the CEOs nor the boards of trustees were accountable to any state or local officials or to the general electorate.

In *Pennsylvania Cyber*, in an unpublished Order dated April 9, 2014, the Board denied the employer’s Request for Review, finding that the Regional Director correctly applied the *Hawkins* test to the particular circumstances of the case, including the employer’s creation, structure, and operation, in light of the relevant legal framework in Pennsylvania. Noting that the employer in *Pennsylvania Cyber*, as in *Chicago Mathematics*, was a non-profit corporation created by private individuals, the Board dismissed the employer’s argument that the entity would not have existed absent the CSL, stating, “No doubt many private entities would not exist but for the public contracts they carry out; they nevertheless are not ‘administrative arms of the government’...” citing *Chicago Mathematics*, slip op. at 6. The Board similarly found the fact that Pennsylvania had chosen to cover charter school employees under various laws governing public employees, and that the CSL refers to charter schools as “public schools” and to their trustees and administrators as “public officials,” is not controlling in ascertaining whether an entity is a political subdivision, citing *Chicago Mathematics*, slip op. at 7 and *Hinds County Resource Agency*, 331 NLRB 1401 (2000). Lastly, the Board specifically noted that it did not view the renewal of the cyber school’s charter by the PDE, “as evidence that trustees are ‘responsible to public officials,’ in the sense contemplated by *Chicago Mathematics* and *Hawkins County*, any more than renewal of a government contract converts a private contractor into a public agency.”

¹⁹ Despite the provisions of the CSL indicating that charter school employees may organize under the PPERA, the PLRB has also declined to assert jurisdiction in another case involving a charter school. *New Media Technology Charter School*, 45 PPER 8 (2013). As in *Agora Cyber Charter School*, the Hearing Examiner relied in part on the Board’s assertion of jurisdiction in *Chicago Mathematics* to find the employer exempt from PLRB jurisdiction under Section 301 of the PPERA.

The Employer contends that contrary to the situations in *Pennsylvania Cyber* and *Pennsylvania Virtual*, there is evidence here that the PDE has the authority to remove and replace members of the BOT, and, in fact, the PDE removed previous members of the Employer's governing BOT and "vetted" the selection of new members of the BOT in 2009. However, that removal and replacement occurred as part of a settlement between the Employer, the PDE, and several other parties after an audit disclosed financial irregularities and the PDE sought to revoke the Employer's charter. The removal and replacement were not required by the CSL or the Employer's Bylaws. Pursuant to the terms of the settlement, the Employer's BOT agreed to cease its litigation and to resign from the BOT after appointing a new BOT with Trustees that were acceptable to the PDE. In return, the PDE agreed not to revoke the Employer's charter. Although the settlement shows PDE involvement in the BOT members' resignation, this involvement stemmed from the settlement, not from authority granted under the CSL. More significantly, the Employer's Bylaws indicate that Trustees may be removed, for specified reasons, based on a two-thirds vote of the BOT, not by any action of the PDE or any other government entity.

In these circumstances, I find that the record does not support a conclusion that the Employer's BOT has any direct personal accountability to any state or local public officials, or to the general electorate. The BOT has the sole authority to appoint and remove Trustees, in accordance with the Employer's Bylaws. The Trustees do not report to any individual who holds any elected office, and they are not responsible to the general electorate as they are not required to stand for election. The Employer's administrators are subject to appointment and removal only by private individuals and not by any public officials. *Chicago Mathematics*, slip op. at 8, 10.

The Employer also argues that PDE oversight of its operations (in particular, its recent corrective action) and the reporting requirements mandated by the Commonwealth (in particular, its obligation to report on the selection of its BOT), constitute evidence that it is responsible to and controlled by public officials. This situation, however, is nearly identical to the facts in *Pennsylvania Cyber*, *Pennsylvania Virtual*, and *John B. Stetson*. The charter schools involved in those cases were subject to the same reporting requirements and academic guidelines mandated under Commonwealth law, as well as statutory obligations under applicable Commonwealth and federal laws for educational institutions, but were found to be within the Board's jurisdiction. According to the Board, the "critical and determinative factor" in deciding if an entity is a political subdivision under the second prong of the *Hawkins County* standard is whether the entity's governing board is appointed and subject to removal by the state. *Chicago Mathematics*, supra, slip op. at 11. Since the school directors in *Chicago Mathematics* were not appointed or subject to removal by the government, the Board found the school was not a public subdivision although the school's contract with the Chicago School District imposed detailed requirements. The presence of these requirements was not sufficient to exempt the employer in *Chicago Mathematics* from the Board's jurisdiction, and the record does not support a contrary result in this case.²⁰

²⁰ I recognize that the Board in *Chicago Mathematics* declined to establish a "bright-line" rule with respect to the Board's jurisdiction over entities which operate as charter schools. Therefore, my determinations are based on the particular facts of this case.

The Employer argues that the Trustees should be viewed as reporting to public officials because the PDE retains the right to revoke the Employer's charter. This right of revocation, however, merely describes the PDE's options in the event that the Employer does not provide a material component of a student's education or if the Employer fails to maintain financial responsibility. It does not impact the authority of the Trustees to administer the Employer's operations and does not give the PDE any control over Trustee appointment and removal.

The Employer also contends that the Employer should be regarded as a branch of the government because the PDE can effectively discharge its teachers by revoking their teaching certificates. But, this same level of control would be present in any case where employees are state-licensed, and the Board has never found that an employer constitutes an exempt entity under Section 2(2) of the Act merely because its employees must have state licenses.

Accordingly, I find that the Employer fails to meet the jurisdictional exemption test under the second prong of *Hawkins*. The record establishes that the Employer is not "administered by" public officials, as no individual involved in the Employer's administration is responsible or has accountability to public officials or to the general electorate.

In sum, I find that the Employer is not a political subdivision of the Commonwealth of Pennsylvania under either prong of the *Hawkins* test. The record reveals that the Employer meets the appropriate standard for the Board's jurisdiction and, therefore, I find that the Employer is an employer within the meaning of Section 2(2) of the Act.

III. THE APPROPRIATE BARGAINING UNIT

1. Relevant Legal Standard

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934, 940 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

Thus, the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group and share a community of interest. In this regard, the Board has made clear that it will not approve fractured units, i.e., combinations of employees that have no rational basis. *Odwalla, Inc.*, 357 NLRB 1608 (2011); *Seaboard Marine, Ltd.* 327 NLRB 556 (1999). An important consideration is whether the employees sought are organized into a separate department or administrative grouping. Also important are whether the employees sought by a union: have distinct skills and training; have distinct job functions and perform

distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002); see also *Specialty Healthcare*, supra, at 942. Particularly important in considering whether the unit sought is appropriate are the Employer's organizational structure and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 n. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude (the) employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, at 944-946, and n. 28 (quoting *Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2017, n. 8 (2011).

2. The Classifications Sought By Petitioner are a Readily Identifiable Group that Share a Community of Interest

To begin with, I find the petitioned-for employees are "readily identifiable as a group." In *Specialty Healthcare*, supra, at 945, the Board explained that a readily identifiable grouping can be based on a variety of factors such as job classifications, departments, functions, work locations, and skills. *Id.* All of the employees in the petitioned-for classifications of general education teacher, special education teacher, special education instructional support specialist, and specialist instruct students on a daily basis in the Employer's virtual classrooms. The petitioned-for classifications are the only employees involved in making lesson plans, presenting curriculums, and grading students; they are the only teachers employed by the Employer. Thus, the petitioned-for employees are readily identifiable as a group based on job classification. *DPI Secuprint, Inc.*, 362 NLRB No. 172, slip op. at 4 (2015); *Macy's Inc.*, 361 NLRB No. 4, slip op. at 10-11 (2014).

Furthermore, the petitioned-for employees are distinctly qualified and skilled because they, unlike other employees, are required to have both a Bachelor's degree and teacher certification. The family coaches and strong start coaches generally have Bachelor's degrees and may have teacher certifications, but they are not required to do so. In addition, while all employees receive professional development training, the petitioned-for employees receive different training than other employees. Cf. *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 4, n. 5 (2014).

The petitioned-for unit employees all work the same hours, receive the same benefits, and earn similar wages; the salary for teachers in these classifications ranges from \$37,800 to \$54,000. *DTG Operations, Inc.*, 357 NLRB 2122 (2011); *Northrop Grumman Shipbuilding, Inc.*, supra. While there is not extensive evidence of contact between the employees in these classifications, the record shows that general education teachers and special education teachers interact at times when they both teach the same students. Some special education students may

attend general education classes, and, in those cases the special education teachers will meet with the academic teacher to discuss the student's progress and to help create the student's IEP. Additionally, as discussed below, the Employer requires its entire staff to attend various Employer-wide events such as meetings and graduation ceremonies.

The Employer's operational structure is currently in flux as a result of a recent reorganization. While the Employer has an organizational chart that it plans to use in the future, it is not clear when it will be implemented or if it will be modified before it is implemented. Moreover, some of the positions listed in the chart are newly-created and/or vacant. As an example of the uncertainty of the Employer's organizational structure, Human Resources Coordinator Morales testified that the advanced learners coach, who is listed as reporting to a principal, will actually be reporting to the Director of Pupil Services in a different subdivision. Additionally, the chart shows, and Morales testified, that the specialists report to the Intervention Specialist. However, Director of Human Resources Emerich testified that they are also supervised by the principals of the schools to which they are assigned.

To the extent the chart can be deemed a reliable indicator of the Employer's organizational structure, the grouping of the petitioned-for classifications does not conform to this structure. Although these three classifications are all in the same department, which is to be headed by the Director of Academic Achievement, they are in three different subdivisions. Each of these subdivisions contains a mixture of teachers and support personnel. On balance, the Employer's organizational structure does not favor a finding that the three petitioned-for classifications share a community of interest. But because of the uncertainties surrounding the Employer's structure, this factor should not be accorded the same weight as in other cases.

In *Bergdorf Goodman*, supra, the Board found that different groups of women's shoe salespersons (Salon and Contemporary) at a department store did not share a community of interest. They worked in separate departments, on different floors, and had separate supervision. The Board found it critical that the petitioned-for grouping did not conform to any administrative or operational lines set by the employer, and that there were no "related factors that could have mitigated or offset that deficit." *Id.*, slip op. at 4. The Board emphasized, however, that a factor that could have justified grouping the two classifications of salespersons, if it existed, was shared skills or training. The Board found that the petitioned-for classifications did not share any particular skills or training; the employees learned how to perform their work on the job and were not subject to any experience or educational requirements. *Id.*, slip op. at 4, n. 5. In the instant case, however, the petitioned-for classifications have significant shared skills and training. The three teachers' classifications in the petitioned-for unit are the only classifications that are trained teachers and are required to be certified as teachers.

Because of their common skills and certifications and their distinctive duties as teachers, I conclude that the employees in the petitioned-for unit share a community of interest and that the petitioned-for unit is appropriate for the purposes of collective bargaining. Although these classifications do not conform to the Employer's anticipated administrative grouping, this grouping is not clear or certain enough to nullify the teachers' community of interest.

3. The Employees the Employer Contends Must Be Added to the Unit Do Not Share an Overwhelming Community of Interest with the Employees in the Classifications Sought by Petitioner

I conclude that the family coaches and strong start coaches that the Employer seeks to add to the unit do not share an overwhelming community of interest with the teachers in the classifications sought by Petitioner. In reaching this conclusion, I rely on the following factors.

Duties, qualifications, and training

The employees the Employer seeks do not have the same job duties, qualifications, and training as the teachers in the petitioned-for unit. Employees in these classifications support the efforts of teachers, but they do not themselves teach students. The family coaches deal primarily with issues such as attendance problems and technology issues, rather than academics. Unlike the teachers, who interact with students exclusively online, the family coaches regularly meet face-to-face with the students and their families. The four strong start coaches facilitate the orientation process for students and families; they interact with students for a short period of time after enrollment to help accustom them to cyber learning. But, there is no evidence that they provide students with any academic instruction. The difference in job duties is significant and weighs against a finding that the family coaches and strong start coaches share an overwhelming community of interest with the employees in the petitioned-for unit. *DTG Operations, Inc.*, supra, at 2126-2127.

Employees in the disputed classifications are not required to have the same professional qualifications as the petitioned-for employees. Strong start coaches are required to have Bachelor's degrees, but for family coaches this degree has been preferred but not required. Although the vast majority have Bachelor's degrees; some of them do not. A majority of family coaches are certified as teachers, but this certification is not required for the position, and the strong start coaches also are not required to have this certification. See *Specialty Healthcare*, supra, at 943.

Additionally, the family coaches and strong start coaches are not required to have the same professional training that petitioned-for employees are required to have. While the Employer provides professional development training for all employees, there is some specific training required for the teachers.

Supervision

Family coaches and strong start coaches do not share supervision with the petitioned-for unit. Although these classifications ultimately report to the Director of Academics and Achievement, the prospective organizational chart indicates that they do not report to any of the same supervisors or managers. Family coaches report to the project manager under the Director of Pupil Services, and strong start coaches report to the Orientation Coordinator. In contrast, general academic teachers report to principals, special education teachers report to the Assistant Director of Special Education, and specialists report to the Intervention Specialist and/or the applicable principal. As discussed above, the Employer's organizational structure is transitional

and uncertain, but there is simply no evidence of common supervision that would help support an overwhelming community-of-interest finding.

Contact, interchange, and functional integration

There is no evidence of temporary interchange between the petitioned-for employees and the disputed classifications. Thus, when teachers are absent, the Employer hires substitutes, rather than having family coaches or strong start coaches fill in for teachers. Employees are not requested or required to work in other classifications on a temporary basis.

Teachers have become family coaches and vice-versa, although the record does not indicate how frequently this has occurred. The family coach coordinator testified that she started working for the Employer as a teacher. She further stated that when the family coach position was first created in 2011, most of the positions were filled by teachers. However, such transfers are not automatic; when an employee is interested in transferring to a different position, the employee is required to apply for the position and possess all required qualifications. In any case, in analyzing interchange, the Board accords less weight to permanent transfers than to temporary transfers. See *Red Lobster*, 300 NLRB 908, 911 (1990).

Although the Employer is a cyber school that operates virtually, employees have occasional direct contact. All employees are required to assist and proctor during annual state-mandated testing. The Employer also has at least one in-person professional development training session per year, which all employees are expected to attend, although there is different training for teachers on that day. The Employer also schedules quarterly or monthly regional “Agora Days Out,” for students to meet each other. Family coaches, who are responsible for organizing these meetings, are required to attend, and teachers often attend although they are not required to do so. There are also monthly virtual meetings conducted by the CEO that all employees attend, as well as virtual meetings for the elementary, middle school, and high schools, where all school staff members discuss matters pertaining to that school. Teachers and coaches also attend graduation and other student events.

As discussed below, family coaches interact with teachers in order to help the students, but the record is uncertain as to how often this occurs. Family coaches may work collaboratively with teachers when their students have issues that interfere with their school work, such as technology or attendance problems. Thus, the family coach coordinator testified that she currently communicates with different teachers on a daily basis, and when she was a family coach, she often worked with teachers to make sure the ILP goals were met. In contrast, a special education teacher testified that she rarely communicates with family coaches, but will only speak to them when she learns about a nonacademic issue that can interfere with the student’s learning, such as a student living in a home without heat.

Based on these interactions, the Employer argues that family coaches and the other disputed classifications perform functions that are similar to those performed by teachers and that the two positions are functionally-integrated. As a result, the Employer argues there is no justifiable reason to exclude family coaches from the proposed unit, citing *Rhode Island Hospital*, 313 NLRB 343 (1993); *Kirksville College of Osteopathic Medicine*, 274 NLRB 794

(1985); and *St. Luke's Episcopal*, 222 NLRB 674 (1976). These cases, which all predate *Specialty Healthcare*, focus on undue proliferation of bargaining units in the healthcare industry. In this case, no such concerns are present, and the interactions between these classifications are insufficient to warrant a finding of an overwhelming community of interest.

Terms and conditions of employment

Family coaches and general education teachers have a similar salary scale, but teachers at the highest levels can earn more than coaches. Thus, the teachers' salary scale ranges from \$37,000 to \$54,000, while family coaches earn \$37,500 to \$50,000. The record does not indicate the salary scale for the special education teachers, specialists, special education instructional support employees, strong start employees or the advanced learners coach, other than a special education teacher's testimony that she believed special education teachers earned more than general academic teachers. All employees have the same benefits and are subject to the same professional code of conduct.

4. Conclusion

There are some significant connections between employees in the petitioned-for classifications and the classifications sought by the Employer. These classifications are all involved in an endeavor to help students succeed in the Employer's cyber school, and they sometimes interact in order to advance this purpose. They have the same hours and benefits and there have been some permanent transfers between the positions. However, while these classifications may have a community of interest, and while the broader unit sought by the Employer might well be an appropriate unit, the classifications the Employer seeks to add do not share such an overwhelming community of interest as to require their inclusion in the unit. Thus, the petitioned-for unit employees have distinct job duties, qualifications, and training, they are separately supervised, and there is no temporary interchange between the classifications. Significantly, although the teachers perform their duties almost exclusively on-line, the family coaches regularly meet with the students in their charge. And, while, the family coaches and strong start coaches play a major role in ensuring the success of the students, their function is different than the academic function of the teachers.

As the Board explained in *Northrop Grumman Shipbuilding, Inc.*, supra, 357 NLRB at 2017, "additional employees share an overwhelming community of interest with the petitioned-for employees only when there 'is no legitimate basis on which to exclude [the] employees from' the larger unit because the traditional community-of-interest factors 'overlap almost completely.'" The Employer has failed to meet this burden. Moreover, this is not a "fractured unit" of the type that the Board disapproves. See *Odwalla, Inc.*, supra. Rather, the unit is rationally drawn based on employee function and qualifications. I therefore find that the petitioned-for unit is appropriate without the addition of the family coaches and strong start coaches. *DTG Operations, Inc.*, supra, at 2128; *Specialty Healthcare*, supra, at 943.

The advanced learners coach

The only evidence concerning the advanced learners coach is the brief testimony by Human Resources Coordinator Morales and special education teacher Michelle Jeffrey, who both stated simply that the advanced learners coach works with gifted students. As noted above, the advanced learners coach's place in the organizational and supervisory structure is unclear, although there was testimony that this position reports to a school principal. There is no job description for the position and no evidence as to interaction with other classifications, salary, or specific job duties. While the incumbent advanced learners coach has a Bachelor's degree and a teacher's certification, it is not clear whether either qualification is required, as there is no job description for that position. Although the duties of the position seemingly have an academic component, the sparse evidence in the record is insufficient to meet the stringent requirements to meet the Employer's burden to prove an overwhelming community of interest under *Specialty Healthcare*. Accordingly, I shall not include this position in the unit.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time K-12 General Education Teachers, K-12 Special Education Teachers, K-12 Specialists, K-12 Math Specialists, K-12 Biology Specialists, K-12 Reading Specialists, and Special Education Instruction Support employees employed by the Employer at the Agora Cyber Charter School, **excluding** all other employees, school psychologist, strong start coaches, academic coaches, student transition coaches, speech pathologist, family coaches, advanced learners coach, long-term substitutes, directors, principals, assistant principals, managers, guards, and supervisors, as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret mail-ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Agora Cyber Education Association/PSEA**.

A. Election Details

The ballots will be mailed on **Monday, April 18, 2016** to employees employed in the appropriate collective-bargaining unit. Ballots will be mailed to voters from the National Labor Relations Board, Region 4, 615 Chestnut Street, Philadelphia, PA 19106. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Voters must return their mail ballots to the Region 4 office by close of business on **Monday, May 9, 2016**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail **by April 25, 2016** should communicate immediately with the National Labor Relations Board by either calling the Region 4 Office at 215-597-6037 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Region 4 Office at 615 Chestnut Street, Philadelphia, Pennsylvania **on Tuesday, May 10, 2016 at 2:00 p.m.** In order to be valid and counted, the returned ballots must be received in the Region 4 Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **March 31, 2016**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **April 7, 2016**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays,

Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: April 5, 2016

/s/ Harold A. Maier

HAROLD A. MAIER²¹

Acting Regional Director, Region 04
National Labor Relations Board
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Philadelphia, PA 19106-4413

²¹ Regional Director Dennis P. Walsh is recused from this matter.